

Billing Code 4310-55

DEPARTMENT OF THE INTERIOR

Fish And Wildlife Service

Notice of Availability and Public Comment Period for documents associated with the Incidental Take Permit (ITP) previously issued to Waterman's Realty Co./Winchester Creek Limited Partnership for the **Home Port on Winchester Creek Habitat Conservation Plan.**

AGENCY: Fish and Wildlife Service, Interior

ACTION: Notice of Availability

SUMMARY: Waterman's Realty Company/Winchester Creek Limited Partnership was issued an ITP, permit number TE006310, on May 13, 1999, for take of the Delmarva fox squirrel. In response to a ruling by the Court of Appeals, the U.S. Fish and Wildlife Service (Service) announces the availability of two documents associated with this ITP and the opening of a 60-day comment period. DATES: Written comments on these documents should be received within 60 days of the date of this publication.

ADDRESSES: Persons wishing to review these documents may obtain a copy at www.fws.gov/r5cbfo, or by written or telephone request to John Wolflin, U.S. Fish and Wildlife Service, 177 Admiral Cochrane Drive, Annapolis, Maryland 21401 (410-573-4573). Additionally, documents will be available for public inspection by appointment during normal business hours (8:00 to 4:30) at the U.S. Fish and Wildlife Service, Annapolis, Maryland. Data or comments concerning the offsite mitigation map or revised analysis should be submitted in writing to the Project Leader, U.S. Fish and Wildlife Service Office, Annapolis, Maryland at the above address. Please refer to permit number TE006310 when submitting comments.

FOR FURTHER INFORMATION CONTACT: John Wolflin at the the above Service Office, Annapolis, Maryland.

SUPPLEMENTARY INFORMATION: On May 13, 1999, after an expanded public comment period of 37 days on the proposed Home Port On Winchester Creek Habitat Conservation Plan (Home Port HCP), the Service issued an ITP for "take" of the Delmarva fox squirrel (DFS). The ITP was issued pursuant to the Endangered Species Act (ESA) §10(a)(2)(B), 16 U.S.C. § 1539(a)(2)(B), and its implementing regulations at 50 CFR 17.22(b)(1). On September 7, 1999, a neighbor to the proposed development (Gerber) and Defenders of Wildlife (DOW) filed suit alleging numerous violations of the National Environmental Policy Act (NEPA), ESA and the Administrative Procedure Act (APA) related to

issuance of the ITP for the Home Port HCP.

The District Court granted summary judgment on all counts in favor of the Service on May 15, 2001. See Gerber v. Babbitt, 146 F.Supp.2d 1 (D. D.C. 2001). DOW appealed the District Court's ruling on two issues: The availability of a map during the original public comment period, and the Service's finding regarding the impracticability of a project design alternative.

A summary of the first issue follows: The Plaintiffs/Appellants, who had been provided approximately 45 days (due to receipt of an advance copy by agreement) to comment on the HCP, notified the Service shortly before the end of the public comment period of their desire for additional time to comment because no map of the offsite mitigation area had been provided. The Service sent them the map, but did not extend the comment period. While the District Court ruled that omission of the map was a harmless error, not in violation of the ESA, the Court of Appeals disagreed. See Gerber v. Norton, 294 F.3d 173, 175, 178-84 (D.C. Cir. 2002). The Court of Appeals held that the failure to allow additional formal opportunity to comment once provided with the map violated the ESA and therefore remanded the matter to the District Court with instructions to remand to the agency. See id. at 184.

The second issue is whether the Service satisfied its statutory

issuance criteria. A summary of this issue follows: Section 10(a) (2) of the ESA, 16 U.S.C. § 1539(a) (2), specifies the requirements for issuance of an incidental take permit. This provision is broken into two distinct subsections. One sets forth the required components of an **application** from which the Service can judge whether an applicant's submission is complete. See Section 10(a) (2) (A), 16 U.S.C. § 1539(a) (2) (A). The other provides the **issuance criteria** by which the Service must evaluate and approve an application package once it has determined the submission is complete. See Section 10(a) (2) (B), 16 U.S.C. § 1539(a) (2) (B).

While the District Court ruled the Service had adequately justified all of its requisite findings, the Court of Appeals agreed with Plaintiffs/Appellants that the Service had violated the ESA by failing to independently make the requisite finding that the developer would minimize and mitigate the impacts of the taking to the maximum extent practicable as required under §10(a) (2) (B) (ii), 16 U.S.C. § 1539(a) (2) (B) (ii). The Court of Appeals held that the Service's finding concerning whether the impacts of the taking from the project would be minimized and mitigated to the maximum extent practicable was made improperly. Specifically, the Court held that the Service did not make its own independent finding as to whether a possible project change identified in the record (the "Reduced Take Alternative") was practicable.

The Service has now conducted its own independent analysis, which is reflected in the draft document entitled "Draft - Assessment of Practicability of the Reduced Take Alternative on Remand". This document evaluates the practicability of additional minimization measures discussed in the Reduced Take Alternative in the Home Port HCP and the practicability of measures considered as alternatives in the Environmental Assessment. The Service has independently evaluated the operative constraints on these measures, which include local governmental processes and permitting, costs and time delays. While the Service was previously aware of many of these constraints, no analysis was presented in detail in any document.

Accordingly, the Service makes available for public review and comment: 1) a map of the offsite mitigation land proposed by the applicant to mitigate for impacts to the Delmarva fox squirrel from the Home Port development in accordance with 16 U.S.C. 1539(a) (2) (B); and 2) a revised analysis of the statutorily mandated finding under 16 U.S.C. 1539 (a) (2) (B) (ii), that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking."

Public Comments Solicited

The Service solicits written comments on the offsite mitigation land proposed by the applicant and a more detailed analysis of the practicability of the reduced take alternative. All comments

received by the date specified above will be considered prior to completion of a revised decision document on remand.

Dated: _____

Dr. Richard O. Bennett

Acting Regional Director